



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF B-P- CORP.

DATE: FEB. 5, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a paint and coating manufacturer, seeks to employ the Beneficiary as a SAP business systems manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record does not establish, as required, that the Beneficiary possessed the experience and special skills required by the labor certification as of the priority date. On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary possessed the experience and special skills required by the labor certification as of the priority date.

Upon *de novo* review, we will dismiss the appeal.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).¹ See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is February 21, 2018. See 8 C.F.R. § 204.5(d).

II. BENEFICIARY'S EXPERIENCE AND SPECIAL SKILLS

The Director determined that the Petitioner has not established that, as of the priority date, the Beneficiary possessed the experience and special skills required by the labor certification for the offered job.

A beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The requirements of the offered position of SAP business systems manager are a bachelor's degree in computer science, business, or related, and 84 months of progressive experience in supply chain management. Part H. 14 lists numerous special skills required for the offered job.

The labor certification states that the Beneficiary has the following experience:

- SAP business system manager with the Petitioner from May 4, 2015, to the date the labor certification was signed;²
- Senior process improvement manager with [REDACTED] Canada, from February 4, 2013, to December 16, 2014;³
- Director of SAP operations with [REDACTED] Canada, from May 22, 2012, to November 19, 2012;
- Manager supply chain architect with [REDACTED] Canada, from September 1, 2009, to May 18, 2012;
- Solutions architect with [REDACTED] Massachusetts, from March 19, 2007, to August 14, 2009;
- Consultant with [REDACTED] New Jersey, from May 17, 2005, to March 3, 2007;
- Senior consultant with [REDACTED] New Jersey, from October 1, 2004, to April 29, 2005;
- Consultant with [REDACTED] New Jersey, from May 17, 2004, to July 28, 2004; and
- Associate consultant with [REDACTED] New Jersey, from January 25, 2003, to April 30, 2004.

² A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). On the labor certification at Part J.21, the Beneficiary attested that she did not gain qualifying experience with the Petitioner in a substantially comparable job. Because the offered job is the same as her listed job with the Petitioner, the record does not support the Petitioner's use of experience that the Beneficiary gained with it.

³ [REDACTED] was formerly known as [REDACTED]. The record establishes that the entity name was changed in July 2013. In this decision, we will refer to the entity as [REDACTED].

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

With the petition, the Petitioner submitted correspondence from the Beneficiary's former employers, including:

- Letter dated February 8, 2017, from [REDACTED] Canada, verifying the Beneficiary's employment from February 4, 2013, to December 16, 2014;⁴
- Email dated November 28, 2017, from [REDACTED] Associate Director of Forecasting for [REDACTED] to the Beneficiary describing the Beneficiary's duties as senior process improvement manager for [REDACTED] from February 2013 to September 2014;⁵
- Email dated February 10, 2017, from [REDACTED] at the [REDACTED] human resources department to the Beneficiary stating that she is "unable to add a [job] description onto either of the letters previously supplied" to the Beneficiary because the Beneficiary's former managers no longer work for [REDACTED];
- Letter from [REDACTED] with [REDACTED] Canada, verifying the Beneficiary's employment as Director, Information Systems, from May 22, 2012, to November 19, 2012;⁶
- Letter dated February 8, 2017, from [REDACTED] Canada, verifying the Beneficiary's employment from September 1, 2009, to May 18, 2012;⁷
- Email dated December 2, 2017, from [REDACTED] Director of Engagement and Digital Solutions at [REDACTED] to the Beneficiary detailing the Beneficiary's duties as a manager of supply chain architecture at [REDACTED] from September 1, 2009, to May 18, 2012;
- Letter from [REDACTED] manager of human resources with [REDACTED] in [REDACTED] Massachusetts, verifying the Beneficiary's employment from March 19, 2007, to August 14, 2009;⁸
- Email dated December 3, 2017, from [REDACTED] to the Beneficiary describing the Beneficiary's duties as a senior program leader and supply chain solutions architect with [REDACTED] from March 19, 2007, to August 14, 2009;⁹
- Letter from [REDACTED] with [REDACTED] Pennsylvania, verifying the Beneficiary's employment as a consultant from May 17, 2005, to March 3, 2006;¹⁰

⁴ The letter states that as of her last day of employment, she held the position of senior process improvement manager. The letter does not detail her specific duties.

⁵ The email states that the Beneficiary worked for [REDACTED] at [REDACTED]

⁶ The letter does not detail the specific duties of the Beneficiary.

⁷ The letter states that as of her last day of employment, she held the position of Manager, Supply Chain Architecture. The letter does not detail her specific duties.

⁸ The letter does not detail the specific duties of the Beneficiary.

⁹ The email was sent from [REDACTED] personal email address and states that the Beneficiary reported to [REDACTED] during her employment with [REDACTED]

¹⁰ The letter does not detail the specific duties of the Beneficiary.

- Letter from [REDACTED] with [REDACTED] New Jersey, verifying the Beneficiary's employment as a senior consultant from October 2004 to April 2005;
- Letter from [REDACTED] with [REDACTED] New Jersey, verifying the Beneficiary's employment as a consultant from May 17, 2004, to July 28, 2004;¹¹ and
- Letter from [REDACTED] with [REDACTED] New Jersey, verifying the Beneficiary's employment in India starting on January 25, 2003, and in the United States from February 19, 2004, to April 30, 2004.¹²

In a request for evidence (RFE), the Director requested additional evidence that the Beneficiary possessed the experience and special skills required by the labor certification as of the priority date. Specifically, the Director advised the Petitioner that correspondence from the Beneficiary's former employers was insufficient to establish her qualifications for the offered job. The Director stated that the Petitioner may submit evidence to overcome the deficiencies noted in the RFE.¹³

In its response to the RFE, the Petitioner submitted an email from [REDACTED], Associate Director of Forecasting for [REDACTED] to the Beneficiary dated July 26, 2018, describing the Beneficiary's duties and special skills as a senior process improvement manager for [REDACTED] from February 2013 to September 2014. It also submitted an email dated July 26, 2018, from [REDACTED] to the Beneficiary describing the Beneficiary's duties and special skills as a senior program leader and supply chain solutions architect with [REDACTED] from March 19, 2007, to August 14, 2009.

In his decision, the Director determined that the record does not establish that the Beneficiary possessed the 84 months of experience required by the labor certification. On appeal, the Petitioner states that the Beneficiary has established 89 months of experience in supply chain management based on her employment with the following employers: [REDACTED] and [REDACTED]. We will address each employer below.

A. [REDACTED] (February 4, 2013, to December 16, 2014)

The Director determined that the letter from [REDACTED] and the accompanying 2017 email from [REDACTED] did not contain all of the required experience. He also stated that in response to the RFE, the Petitioner did not provide evidence directly from [REDACTED].

The Petitioner acknowledges on appeal that the letter from [REDACTED] does not comply with regulatory requirements because it does not contain a job description. The Petitioner asserts on appeal that it cannot obtain a sufficient letter because [REDACTED] refused to issue a letter containing a job description. It states that the emails from [REDACTED] should be accepted as evidence of the

¹¹ The letter does not detail the specific duties of the Beneficiary.

¹² The letter does not detail the specific duties of the Beneficiary.

¹³ The Director also requested additional evidence regarding the Beneficiary's education and the Petitioner's ability to pay the proffered wage.

Beneficiary's experience because a regulatory-compliant letter from [REDACTED] is unavailable pursuant to 8 C.F.R. § 204.5(g)(1). We agree. The Petitioner has established that a sufficient letter from [REDACTED] is unavailable. The emails from [REDACTED] establish that the Beneficiary gained qualifying experience with [REDACTED] from February 2013 to December 2014. The emails from [REDACTED] also establish the Beneficiary's acquisition of the special skills required by Part H.14 of the labor certification.

B. [REDACTED] (September 1, 2009, to May 18, 2012)

The Petitioner acknowledges on appeal that the letter from [REDACTED] does not comply with regulatory requirements because it does not contain a job description. The Petitioner states that the email from [REDACTED] should be accepted as evidence of the Beneficiary's experience because a regulatory-compliant letter from [REDACTED] is unavailable pursuant to 8 C.F.R. § 204.5(g)(1). Although the Petitioner has established that a sufficient letter from [REDACTED] is unavailable, the email from [REDACTED] does not indicate how he obtained his knowledge regarding the Beneficiary's experience at [REDACTED]. The email does not indicate that [REDACTED] ever worked with the Beneficiary at [REDACTED]. Therefore, the email from [REDACTED] does not establish that the Beneficiary gained qualifying experience with [REDACTED] from September 1, 2009; to May 18, 2012.

C. [REDACTED]

In his decision, the Director determined the 2009 letter from [REDACTED] "did not explain if the beneficiary worked full-time or part-time." The Director also noted that the emails from [REDACTED] were not "directly from [REDACTED]". The Petitioner acknowledges on appeal that the letter from [REDACTED] does not comply with regulatory requirements because it does not contain a job description. It asserts that it cannot obtain a sufficient letter because [REDACTED] no longer exists. It submits an article indicating that [REDACTED] was acquired by [REDACTED] in 2011 and states that the emails from [REDACTED] should be accepted as evidence of the Beneficiary's experience because a regulatory-compliant letter from [REDACTED] is unavailable pursuant to 8 C.F.R. § 204.5(g)(1). We disagree.

The Petitioner has not demonstrated that a sufficient letter cannot be obtained from [REDACTED]. The article regarding the acquisition of [REDACTED] by [REDACTED] states that the new entity is known as [REDACTED] and that it retained several senior [REDACTED] executives. The acquisition would likely have included the assets, liabilities, and employee records of [REDACTED]. The Petitioner has not established that it requested a letter from [REDACTED] and that the company cannot, or will not, issue one. Further, it is not clear if the Petitioner, [REDACTED] and the entity mentioned in the article, [REDACTED] are the same entity. Thus, we will not accept the emails from [REDACTED] in lieu of a letter from [REDACTED] which includes the name, address, and title of the writer, and a specific description of the duties performed by the Beneficiary. The emails from [REDACTED] do not establish that the Beneficiary gained qualifying experience with [REDACTED] from March 19, 2007, to August 14, 2009.

D. [REDACTED]

In his decision, the Director indicated that the letter from [REDACTED] “did not contain the specific duties, specific skills or other requirements attained by the beneficiary.” On appeal, the Petitioner asserts that the letter meets the regulatory requirements of 8 C.F.R. § 204.5(g)(1). We agree. The letter contains a description of the duties of the Beneficiary and verifies her qualifying employment with [REDACTED] from October 2004 to April 2005.

The Petitioner has established that the Beneficiary has less than three years of qualifying experience (with [REDACTED] from February 2013 to December 2014 and with [REDACTED] from October 2004 to April 2005), which is less than the 84 months of qualifying experience required by the labor certification.

In his decision, the Director also determined that the Beneficiary does not have all of the special skills required by Part H.14. of the labor certification. The totality of the record establishes that the Beneficiary has the special skills required by Part H.14. of the labor certification. We will withdraw this portion of the Director’s decision.

In sum, the record establishes that the Beneficiary has the special skills required by Part H.14. of the labor certification. However, it does not establish that the Beneficiary has the 84 months of experience in supply chain management required by the labor certification for the offered job. Thus, the Petitioner has not established that the Beneficiary is qualified for the offered job.

III. ABILITY TO PAY THE PROFFERED WAGE

Although not addressed by the Director, the Petitioner did not establish its continuing ability to pay the proffered wage from the petition’s priority date in 2018 onward. The proffered wage is \$167,003 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it had sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage.¹⁴

The Petitioner submitted copies of paychecks demonstrating that it employed and paid the Beneficiary \$92,194.62 in gross pay through June 8, 2018. The Petitioner must demonstrate its ability to pay the difference of between the annual proffered wage and the amount it paid to the Beneficiary in 2018. The record does not contain the Petitioner's annual report, federal tax return, or audited financial statements for 2018, nor does it does contain a statement from a financial officer which establishes its ability to pay the proffered wage.¹⁵ In any future proceedings, the Petitioner must establish its continuing ability to pay the proffered wage from the petition's priority date in 2018 onward.

IV. CONCLUSION

The Petitioner has not established that the Beneficiary possessed the experience required by the labor certification as of the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of B-P- Corp.*, ID# 2480360 (AAO Feb. 5, 2019)

¹⁴ Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292, 294-295 (5th Cir. 2015).

¹⁵ On the petition and labor certification, the Petitioner indicated that it employs over 100 workers.